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April 12, 2004

VIA FACSIMILE and  
FIRST CLASS MAIL

Enforcement Sensitive

Mr. Michael O. Leavitt  
U.S. Environmental Protection Agency  
Ariel Rios Building (1101A)  
1200 Pennsylvania Avenue NW  
Washington, D.C. 20460



Mr. John Iani  
Regional Administrator  
Region X  
U.S. Environmental Protection Agency  
1200 Sixth Avenue  
Seattle, WA 98101

Re: Request for Government-to-Government Meeting Between EPA and  
the Confederated Tribes of the Colville Reservation Concerning  
Enforcement of the Unilateral Administrative Order for RI/FS Issued  
to Teck Cominco Metals, Ltd., Docket No. CERCLA 10-2004-0018  
(December 11, 2003), Upper Columbia River Site

Dear Administrator Leavitt and Regional Administrator Iani:

We represent the Confederated Tribes of the Colville Reservation (Tribes), a sovereign Indian Tribe, whose government is recognized by the United States and to whom the United States Environmental Protection Agency (EPA) and the United States owe a sacred duty of trust. The Tribes are deeply concerned that this trust obligation is not being honored. The purpose of this letter is to express the Tribes' concern to request that you both attend a meeting at the Colville Reservation to discuss this matter fully with the Tribes' governing body, the Colville Business Council.

As you may know, the Tribes have provided Teck Cominco Metals, Ltd. (TC) with sixty (60) days advance notice, in accordance with 42 U.S.C. § 9659(d)(1), of the Tribes' intent to file a Citizens Suit against TC pursuant to Section 310(a)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),

Michael O. Leavin

John Iani

Page 2

42 U.S.C. § 9659(a)(1). The suit will be filed in the United States District Court for the Eastern District of Washington. The Tribes have taken this extraordinary action because EPA has not acted to carry out its duty under the law.

EPA is aware that TC has violated, and to date has continued to violate, CERCLA by failing to fulfill its obligation to comply with the Unilateral Administrative Order for Remedial Investigation/Feasibility Study (UAO) which EPA Region 10 issued to TC on December 11, 2003 pursuant to § 106(a) of CERCLA, 42 U.S.C. § 9606(a).

In particular, EPA is aware that *inter alia*, TC has violated and continues to violate 42 U.S.C. § 9606(a) as follows:

1. TC has failed to comply with the terms and conditions of the December 11, 2003 UAO. TC's failure to comply constitutes a violation of a condition, requirement or order which has become effective under CERCLA.

2. TC has failed to provide EPA with notice of its intent to comply with the terms of the UAO within ten days of the effective date of the UAO, in violation of § VII of the UAO. To the contrary, TC unequivocally indicated its intent not to comply with the terms of the UAO by its January 12, 2004 letter dated from G. Leonard Manuel directed to Michael P. Gearheard. TC's conduct constitutes a violation of a condition, requirement or order which has become effective under CERCLA.

3. TC has failed to perform the Remedial Investigation/Feasibility Study ("RI/FS") and submit deliverables as provided in the Statement of Work ("SOW"), Attachment 1 to the UAO, in violation of § IX(4) of the UAO. TC's conduct constitutes a violation of a condition, requirement or order which has become effective under CERCLA.

The above-described violations reflect only that information which is available to the Tribes as of the date of this letter. In light of these ongoing violations, and EPA's inaction, the Tribes are compelled to sue for all violations, violations not yet discovered, as well as those committed subsequent to the date of this letter. The Tribes have also given TC notice of the Tribes' intent to sue for all fines and penalties TC is obligated to pay to the United States as well as all other legal redress to which the Tribes may be entitled, including an award of the Tribes' reasonable costs of litigation in accordance with 42 U.S.C. § 9659(f).

Since Indian Tribes were first recognized by EPA as full governmental partners some 20 years ago, the Tribes have accepted this responsibility and taken their stewardship obligation to heart by embracing the government-to-government Tribal/EPA

Michael O. Leavitt

John Iam

Page 3

relationship across the broad scope of federal environmental laws administered by EPA, including the CERCLA program. For the first time in the Tribes' relationship with EPA, the instant situation is causing the Tribes to question whether it was a mistake to place their faith in EPA.

We understand that the studies TC refuses to perform are intended to further determine the nature and extent of hazardous substances released by TC in and about the Lake Roosevelt and Upper Columbia River environment (the Site). We further understand that the RI/FS is intended to enable EPA to develop alternative ways to address the contamination that currently poses a threat to both human health and the environment.

However, to date, EPA has taken no action itself to enforce the UAO, and from our contact with the United States Department of Justice (DOJ) we understand that DOJ has not yet decided whether it will support EPA's enforcement of the UAO. Recently, because EPA Region 10 has held its ground, Canada intervened in this matter on behalf of TC and submitted a form of "settlement offer" to the United States State Department (Department) which the Department is currently considering. We have been informed by the Department that EPA is currently reviewing the Canadian offer (made for TC).

We further understand from published sources that the proposed offer does not comply with Superfund and will not be protective of the Tribes' rights or interests either as a sovereign government or as a natural resource trustee. The fact that EPA is even considering a non-CERCLA proposal is unacceptable to the Tribes who have steadfastly supported EPA in this process and have believed in EPA's conviction to carry out the law in a fair and evenhanded manner.

To add insult to injury, we have been told by the Department that the Tribes - like the State of Washington - will not even get a chance to review the Canadian (TC) proposal until after the Department, in consultation with EPA, determines that the offer is worth further consideration. However, even before the offer has been fully considered, we understand that additional meetings have been scheduled (not really negotiations - rather question and answer sessions) without participation by either the Tribes or the State of Washington. Such actions are a further deviation from EPA's Indian Policy and are inconsistent with the trust obligation owed to the Tribes.

As stated above, the Colville Business Council is empowered and obligated under Article V, Section 1 of the Tribal Constitution to protect the health, security and general welfare of all people who either reside on or do business within the exterior boundaries of the Reservation, including both members of the Tribes as well as non-members

Michael O. Leavitt

John Iani

Page 4

(Reservation Population). In addition, the Business Council is responsible for protecting the environmental quality and the natural resources in and about the Reservation and in those areas where the Tribes have reserved hunting and fishing rights (Reservation Environment). In particular the resources in and about Lake Roosevelt and the Upper Columbia are of paramount importance to the Tribes.

It is the position of the Colville Business Council that enforcement of the UAO pursuant to CERCLA is necessary to protect the health and welfare of the Reservation Population and the quality of the Reservation Environment from adverse impacts resulting from the hazardous substances released by TC into the environment. It is the further position of the Tribes that the CERCLA actions taken to date by EPA to investigate past and ongoing releases of hazardous substances into the Upper Columbia River Basin have correctly determined that TC should be held responsible and directed to conduct further investigation in and about Lake Roosevelt and the Upper Columbia River Basin.

Moreover, EPA is aware of the fact that under CERCLA, the Tribes are natural resource trustees with whom EPA has a statutory duty to coordinate as set out in Section 104(b)(2) (along with the other CERCLA Natural Resources Trustees), with regard to the investigation assessment and pursuit of natural resource damages claims and actions. In short, the Tribes along with the Spokane Tribe and the State of Washington (and certain federal agencies) are trustees under CERCLA for natural resources as described in Section 101(16) of CERCLA. As trustees, each sovereign government has a fiduciary duty to investigate and, if appropriate, to assert a statutory claim under CERCLA for injury to natural resource which belong to, are managed by, appertain to, or are otherwise controlled by such governmental entities asserting trusteeships.

The Tribes have informed EPA on numerous occasions that the Tribes wish to cooperate with EPA with regard to their role as a natural resource trustee and with regard to the investigation and potential CERCLA remedial action in and about Lake Roosevelt and the Upper Columbia River Basin. EPA has a reciprocal duty under CERCLA and its Indian Policy to coordinate and cooperate with the Tribes.

As EPA knows, the Tribes have provided TC with a 60-day notice of a CERCLA Citizen Suit with regard to TC's failure to comply with the UAO issued to TC by EPA directing TC to conduct an RI/FS investigation of the Site. However, rather than having to take such action and initiate suit, the Tribes respectfully request that EPA pursue active enforcement of the UAO against TC.

The Canadian proposal, and the intervention of the Department into what, absent the political pressure asserted by TC, should have been a straightforward CERCLA

Michael O. Leavitt

John Iani

Page 5

matter does violence to the long relationship between EPA and the Tribes. The charade being played out by the Canadian government as spokesperson for TC, is offensive. EPA, with the support of DOJ, should enforce the law as EPA feels necessary - that is why EPA was created in the first place - to be the independent federal agency without a conflicting mission that would stand in the way of evenhanded enforcement of the law. Here, DOJ appears to be gatekeepers rather than the lawyer acting at the request of its client - EPA.

At the end of the day, what is the real harm if the law was to be enforced as written? TC would either be found to be within the scope of CERCLA jurisdiction and the UAO would be enforced, or, TC would be found to be beyond the reach of CERCLA and the Site would be placed on the NPL so the studies and clean up work could be funded by CERCLA. If TC really wants to "do the right thing," I expect that TC will remain available to fund some portion of the work. Time will tell.

In conclusion, EPA needs to fulfill its obligation to the Tribes under the remedial provisions of CERCLA. Moreover, EPA has an independent duty to meet its obligation to the Tribes in their capacity as a natural resource trustee. Simply put, EPA has no statutory authority to do otherwise. Any action undertaken by EPA toward the negotiation of non-CERCLA study program or remedial process with Canada (for TC) is beyond the scope of EPA's statutory authority and therefore *ultra vires*.

This matter is of critical concern to the Tribes. It is time that Administrator Leavitt, together with Regional Administrator Iani, come together to the Colville Reservation to conduct a government-to-government meeting with the Colville Business Council to discuss how this matter can be resolved in a manner consistent with applicable law and policy. Accordingly, the Business Council respectfully requests that you participate in a face-to-face meeting on the Colville Reservation at the earliest possible date.

Very truly yours,

SHORT CRESSMAN & BURGESS PLLC



Richard A. Du Boy

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